***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

Original - Affidavit of Mailing

# 74-1521 B

*To be argued by*
THOMAS R. MAHER

P/S

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 74-1521**

UNITED STATES OF AMERICA,

*Appellee,*

*—against—*

ARTHUR WILLIAM CABRERA,

*Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

## BRIEF FOR THE APPELLEE


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## FOR THE SECOND CIRCUIT

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*Appellant.*

## BRIEF FOR THE APPELLEE

### Preliminary Statement

Arthur William Cabrera appeals from a judgment of the United States District Court for the Eastern District of New York (Mishler, *Ch. J.*), entered on April 19, 1974, after a non-jury trial, which judgment convicted appellant of the knowing, wilful and continuous failure to report for an Armed Forces pre-induction physical from April 13, 1971 to August 29, 1972.

Appellant was charged in a two count indictment with the failure to report for pre-induction physical (Count Two) as well as the failure to report for induction, both offenses in violation of Title 50, United States Code Appendix, Section 462(a). On January 21, 1974, trial was held before Chief Judge Mishler. Thereafter, on March 6, 1974, in a Memorandum Decision and Order, Chief Judge Mishler found appellant not guilty on Count One and guilty on Count Two.

On April 19, 1974, appellant was sentenced to three years imprisonment—to serve three months, execution of balance suspended and probation for thirty-three months. Appellant is on bail pending this appeal.

Appellant's principal argument on this appeal challenges the sufficiency of Government's evidence on the issue of intent. He also charges that the prosecution against him was "premature".

## Statement of the Case

(1)

The evidence at trial revealed that appellant was classified 2-S in October 1969 by his local board in Hempstead, New York. He enjoyed his student deferment until December 1969 when he was reclassified 1-A upon his withdrawal from college.

While residing in Springfield, Massachusetts in January 1970, he was ordered to report for pre-induction physical at which time he was found unfit for military service and classified 1-Y as charges for disorderly conduct, assault against an officer and assault with a dangerous weapon were pending against him. However, when advised by the appellant's attorney in January 1971, that the charges were disposed of in September 1970, the Local Board issued a 1-A classification to his address in Springfield, Mass., on February 24, 1971.

In the meantime, in May 1970, the appellant completed a current information questionnaire (SSS Form 127) and replied to the Local Board's inquiry concerning his fitness for service that, "I will not serve in any American service" (Exhibit 1-D; Appendix C-1), and in October 1970 he requested a duplicate classification card and remarked in his letter; "Please don't expect me ever to answer the call to Uncle KKK Sam. Death to the Fascist Pig!" (Exhibit 1-E; Appendix C-5).

On March 23, 1971, the Local Board mailed an order for a pre-induction physical to his Springfield, Mass. address, and it, like all the previous correspondence, was not returned by the Post Office. There was no indication that he did not receive the order.

However, he failed to report and on April 23, 1971, the board issued an induction order for May 20, 1971, which similarly was not returned by the Post Office. He failed to report on May 20, 1971, or any date thereafter. However, on June 15, 1971, appellant wrote a three page letter to his Local Board which provided the Springfield, Mass. return address, and referred to the pre-induction and induction orders. The letter in part reads:

> "I was just notified by a friend that I received two letters from my Selective Service Board in Long Island, New York . . . you see I have been in Cuba the last two months . . . for the Vinceremos Bridgade. It was a real bummer to return to the United States of America to find out that I not only received my physical, but I also was selected from all the youths of Amerikkka (sic) to serve in the Armed forces. Well! to this I say 'death to all running dogs and there (sic) imperialist lackeys' that means you! I as a communist revolutionary could never serve in the U.S. Armed Forces. . . ."

Appellant's Selective Service file was then forwarded to the State Headquarters for review and thereafter the matter was referred to the United States Attorney for consideration toward prosecution.

In October 1971 the appellant again requested a duplicate classification card and same was provided.

The appellant was indicted on August 29, 1972.

The appellant neither took the stand nor offered any evidence in his own defense. However, his United States Passport was received in evidence by stipulation and it indicated that he left Mexico on March 24, 1971, destined for Cuba.

(2)

Following the trial, in a Memorandum of Decision of Order,* dated March 6, 1974, Chief Judge Mishler found appellant guilty of knowingly and willfully failing to report for his pre-induction physical. Specifically, Chief Judge Mishler found that due notice of the pre-induction order was properly mailed to appellant's last known address; that appellant had knowledge of the notice to report for a pre-induction physical on or about June 15, 1971 (the date of his letter to his local board upon his return from Cuba); appellant had a continuing obligation to submit to a pre-induction physical and, of course, that he knowingly failed to report).

Appellant was found not guilty of the charge of willfully failing to report for induction. On that count the District Court found that the Notice of Induction was mailed to appellant while he was in Cuba contrary to the instructions of Local Board Memorandum No. 73 which required the Local Board to postpone the issuance of an induction order "until further notice" whenever the registrant is in Cuba.** The District Court reasoned that be-

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* The Memorandum of Decision and Order is reproduced in appellant's appendix E-1.

** Local Board Memorandum No. 73 provided in pertinent part: "Whenever any registrant is in Cuba, the local board shall postpone the issuance of his Order to Report for Induction (SSS Form No. 252) until further notice. . . ." The Government argued before the District Court that because the local board had no way of knowing appellant was in Cuba (particularly because appellant failed to advise his local board), the board had no reason to invoke the memorandum.

cause of this irregularity appellant was not obligated to report for induction and in no way could be charged with a continuing obligation to respond to an invalid order even after his return to the United States.

## ARGUMENT

### The evidence convincingly showed that appellant knowingly and willfully refused to report for pre-induction physical.

Although appellant argues broadly that the Government's evidence was insufficient to prove the necessary element of criminal intent, his argument launches several satellite issues concerning the pre-induction notice which he claims was insufficient as well as the alleged failure of the Local Board to respond to his letter of June 15, 1971, which failure it is now claimed, relieved him of his continuing duty to submit to the pre-induction physical. These issues were all answered in Chief Judge Mishler's Memorandum of Decision dated March 6, 1974, and may be summarily disposed of on this appeal.

To initiate his argument, appellant asserts that the Government failed to prove his receipt of the letter ordering him to report for pre-induction. Putting aside for the moment appellant's June 15th letter to the Local Board wherein he admits unequivocally the eventual receipt of both the pre-induction and induction orders, the evidence on balance sufficiently proves the receipt of the pre-induction order. As Chief Judge Mishler noted in his Memorandum of Decision, the mailing of the pre-induction order by the Draft Board on March 23, 1971 to appellant's last-known address in Springfield, Massachusettes created a presumption of receipt. Of course, this presumption is strengthened by the fact that the March 23rd letter, like all other correspondence from the Local Board to appellant, was never re-

turned to the local board. Appellant's reliance on *United States* v. *Smith,* 308 F. Supp. 1262 (S.D.N.Y. 1969) is misplaced. In *Smith,* the registrant was able to present evidence to rebut the presumption of receipt when he proved that mail in his unlocked mailbox had previously been stolen and after the court took notice that frequent thefts had occurred in that area. In the present case, appellant has simply presented no evidence to rebut the presumption that he actually received the letter ordering him to report for pre-induction.

Any question as to whether appellant received notice of the pre-induction physical is, of course, thoroughly resolved by his own written acknowledgement of June 15th that he had in fact eventually received notice of both the pre-induction and induction orders. As Judge Mishler properly concluded, actual receipt of the written order itself is not required to fullfill the notice requirement. *United States* v. *Velazquez,* 490 F.2d 29, 37 (2d Cir. 1973); *United States* v. *Abrams,* 476 F.2d 1067, 1070 (7th Cir. 1973); *United States* v. *Williams,* 433 F.2d 1305, 1306 (9th Cir. 1970).

In his June 15, 1971 letter to the Local Board, appellant stated:

> "I was just notified by a friend that I received two letters from my Selective Service Board in Long Island, New York. On my arrival back to the United States of Amerikkka. . . . It was a real bummer to return to the U.S.A. to find out that I not only received my physical but I also was selected from all the youth of Amerikkka to serve in the Armed forces.'

Assuming *arguendo* that appellant did not receive the actual written notice to report for pre-induction in March 1971, his acknowledgement upon his return to the United States in June 1971 that he received both the pre-induction and induction orders conclusively demonstrates that the

Government adequately proved notice to the registrant in the District Court. Needless to say, appellant's related argument that he was not specifically advised as to the exact contents of the pre-induction letter is likewise resolved by the appellant's spirited June 15th letter.*

Conceding that under ordinary circumstances a registrant has a continuing obligation to comply with a pre-induction notice, appellant next claims that he was relieved of this obligation by the nature of the notice given to him upon his return to the United States in June of 1971.** Assuming *arguendo* that the Government's proof of actual receipt of the written order through the presumption of regularity was deficient, appellant's argument is nevertheless without merit. Citing *United States* v. *DeNarvaez*, 407 F.2d 185 (2d Cir.), *cert. denied*, 396 U.S. 822 (1969), appellant argues that the Local Board was obligated to respond to his June 15th letter and make a "greater effort" to insure that appellant was aware of his rights and obligations. Appellant's curious reliance on *DeNarvaez* is indeed misplaced. In *DeNarvaez*, the registrant was in Bogata, Colombia when the pre-induction notice was mailed to his address in New York. His parents forwarded the notice to

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* Directly going to the question of appellant's criminal intent, Chief Judge Mishler offered the following observations in his Memorandum of Decision: "Finally, the Court notes defendant's timing in leaving the country, his failure to keep the Board advised of his address, his failure to notify the Draft Board of his intended departure from the United States and his failure to obtain permission to do so. All of these factors have a direct bearing on the crucial question of defendant's intent." Memorandum of Decision, page 9.

** 32 C.F.R. § 1641.4(b) states in part: "Regardless of the time when or the circumstances under which a registrant fails to report for Armed Forces examination when it is his duty to do so, it shall thereafter be his continuing duty from day to day to report for Armed Forces examination to his local board and to each local board whose area he enters or in whose area he remains."

him and advised the Local Board in writing that their son had not received the letter. The Local Board then sent a second notice directly to the registrant in Bogata and predictably DeNarvaez claimed he did not receive this notice either. The Board sent a third notice to another address in Florida of which it had been advised. The registrant likewise claimed that he never received this notice. Thereafter in April the registrant returned to the United States for approximately one week without contacting his Local Board. The *DeNarvaez* court held that delayed receipt of the pre-induction did not invalidate the order and did not relieve that registrant of his continuing obligation to report.

> While it is true that the Board mailed the notice to report to appellant at a time when it knew he was in Bogata and while it is also apparent that appellant returned to the United States after the date on which he was to report, it is nonetheless proper to conclude that on his arrival he discovered that he was to have gone for a physical examination on April 3, 1962 because the Board's letter was never returned. Aware that he had that responsibility, it became his continuing duty to so report. 32 C.F.R. § 1628.16(b).

Ignoring the unambiguous lesson of the *DeNarvaez* decision, appellant points, by way of comparison, to the greater efforts of DeNarvaez' Local Board to insure notice to the registrant by their three letters to New York, Bogata and Florida. This factual difference is insubstantial and in view of the fact that appellant never provided his Local Board with a change of address (an apparent violation of Selective Service Regulations), his comfort with that case defies explanation. His claim that his June 15th letter should have prompted the Local Board to advise him of his continuing obligation is laid to rest by the District Court:

> "The regulation making compliance with an order of a pre-induction physical a continuous obligation,

> 32 C.F.R. § 1641.4(b), is definitive and is not couched in contingencies. Furthermore, the regulations do not require that a registrant be notified of a continuous obligation to report for a pre-induction physical. Local Board Memorandum 106 states that when a registrant fails to report for a physical, he can be considered acceptable and can be ordered for induction.* The minutes of action on Cabrera's file indicate that this procedure was followed. No requirement existed whereby failure to comply with the order would necessitate efforts by the Board to exact compliance. Moreover, there is no indication that the action taken by the Board was influenced by defendant's professed intention not to serve."

Memorandum of Decision, pages 11-12.

Finally, appellant was in no way misled by the Local Board on the question of his continuing obligation nor is there any indication in the evidence that appellant was misled by the fact that the Board did not respond to his letter of June 15th. Nor is there any indication that the Board acted inconsistently and thereby mislead appellant with respect to his continuing obligation to report.**

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* *See also*, 32 C.F.R. § 1628.1(a). This regulation states in part: "[A] registrant who has failed or refused to report for and submit to an armed forces examination may have his acceptability determined at the time he reports for induction."

** Appellant relies on *United States* v. *Gross*, 5 SSLR 3728 (S.D.N.Y. 1972), for the proposition that inconsistent actions by a local board in responding to a registrant's initial failure to comply with an order to report could excuse the registrant from his continuing obligation. In *Gross*, the District Court concluded that the registrant was justified in believing that his continuing duty to report had been waived because of the inconsistent action of that local board following Gross' initial failure to report. The court listed these inconsistencies as follows:

[Footnote continued on following page]

Appellant's final argument that the prosecution was premature, relying on *United States* v. *Haug,* 150 F.2d 911 (2d Cir. 1945), is likewise without merit. In *Haug* the registrant was prosecuted for anticipated action. The Local Board sent a questionnaire to Haug at an address he had given but because his name was incorrectly noted the questionnaire never reached him. Having acknowledged that he would not have filled out the questionnaire had it reached him, an indictment followed. The Government's theory that he could be charged as having not completed the questionnaire because his intent was clearly not to comply. This Court concluded that the attitude of an inductee toward the possibility of military service does not alter the rights which are guaranteed to him nor the procedures which must be followed by the Local Board. The Court concluded that the mere expression of his intent not to comply was not a crime in itself and barring his receipt of the questionnaire he could not be prosecuted for his anticipated action. In the present case, appellant regularly voiced his strong intention not to serve. It was not, however, until he failed to comply with the pre-induction order, after proper notice, that the indictment followed.

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(1) The Secretary of the Draft Board told his parents not that he would have to report for a physical on another date, but, rather, that he would be charged with being a delinquent if he had no excuse. (2) The Board entertained a subsequent hardship deferment request. (3) The Board rejected the hardship deferment request but did not order a physical examination. (4) The Board then deferred induction. (5) On the death of the defendant's father the Board did grand a hardship deferment. (6) The Board later withdrew the hardship deferment and reclassified the defendant 1-A without notifying him of his 'continuing duty' to take a physical examination.

Appellant is unable to demonstrate how his local board acted in a similarly inconsistent manner. Without specifying a single inconsistent act, he merely charges that his local board should have responded to his letter of June 15, 1971.

The evidence adduced at trial convincingly demonstrated the appellant's knowing and willful failure to comply with the notice to report for his pre-induction physical. In short, appellant's Selective Service file offered glaring evidence of his wilful intention not to serve. In May 1970, appellant responded to a questionnaire by writing—"I will not serve in any American service." In October 1970, appellant wrote, in more convincing terms—"Please don't expect me ever to answer the call to Uncle KKK Sam. Death to the Fascist Pigs." And of course, in his letter of June 15, 1971, appellant made good his promise and boasted—"I as a communist revolutionary could never serve in the U.S. Armed Forces. . . ." Appellant's challenge to the sufficiency of the evidence is totally without merit.

## CONCLUSION

**The judgment of conviction should be affirmed.**

Respectfully submitted,

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*Eastern District of New York.*

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*Eastern District of New York,*
*Of Counsel.*

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Notarize

# AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

DEBORAH J. AMUNDSEN, being duly sworn, says that on the 11th day of JULY 1974, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, ~~a~~ two copies of the brief for the appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Edward N. Leavy, Esq.
Leavy & Shaw, Esqs.
233 Broadway
New York, NY 10007

Sworn to before me this
11th day of 1974

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1975

Deborah J. Amundsen

DEBORAH J. AMUNDSEN

SIR:

PLEASE TAKE NOTICE that the within will be presented for **settlement and signature** to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ____ day of _____, 19___, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,
_____, 19___

_____
United States Attorney,
Attorney for _____

To:

_____

_____

_____

Attorney for _____

SIR:

PLEASE TAKE NOTICE that the within is a true copy of _____ duly **entered** herein on the ____ day of _____, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,
Dated: Brooklyn, New York,
_____, 19___

_____
United States Attorney,
Attorney for _____

To:

_____

_____

_____

Attorney for _____

_____ Action No._____

**UNITED STATES DISTRICT COURT**
**Eastern District of New York**

—Against—

_____
United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____ is hereby admitted.
Dated: _____, 19___

_____
Attorney for _____

FPI MI—2-23-71-50M-5963